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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	DOCKET FILE COPY ORIGINAL
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992:	)	MM Docket No. 92-266
	)	
Leased Commercial Access	)	CS Docket No. 96-60

REPLY COMMENTS OF LIBERTY SPORTS, INC.

Liberty Sports, Inc. submits these reply comments to address the potentially devastating impact of the Commission's leased access proposal upon programming diversity. Notwithstanding the Commission's disclaimer in the Further Notice of Proposed Rulemaking, the documented record establishes that the Commission's valuation methodology and mandated carriage preferences constitute a substantial regulatory subsidy for leased access programmers which would cause widespread deletions of existing programming services, curtail investment in programming, and stifle launches of new services.

I. Concrete Applications Of The Commission's Valuation Proposal Confirm That It Is Fundamentally Flawed.

All industry segments have agreed that cable channel capacity is a valuable asset. The dispute has been limited to the proper valuation of such capacity and a fair price for leased access channels. Thus, a Commission methodology which consistently yields a negative or zero value for leased access channels is inherently suspect. For example, of the 47 programming services which Tele-Communications, Inc. ("TCI") tentatively designated for deletion to accommodate leased access, 38 (81 percent) "had a negative net opportunity cost under the Commission's formula." TCI Comments at 15. If the Commission's formula were a reliable indicator of value, this result would suggest that TCI should immediately delete all 38 services from its systems.[1] Other commenters using the Commission's valuation formula also consistently calculated negligible values for leased access channels. See, e.g., Stanley M. Besen & E. Jane Murdoch, "The Impact of the FCC's Leased Access Proposal on Cable Television Program Services" ("Impact of FCC's Leased Access Proposal"), annexed to Joint Comments of Turner Broadcasting System, Inc., News Corporation, Ltd., and C-SPAN, at 15; NCTA Comments at 18.

The counter-intuitive and unrealistic results of the Commission's valuation formula are largely attributable to an essential element of programming value which the Commission intentionally omitted as speculative -- the impact of programming on subscriber demand for cable service. Thus, when TCI surveyed subscribers to the same programming

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[1] As one industry expert explains, cable operators, acting in their own self-interest, would voluntarily delete such channels and substitute leased access channels if the Commission's underlying theory were correct. The fact that this behavior has not occurred suggests the contrary:

> Hence, if the Commission's theory is correct, cable operators should be replacing cable networks with leased commercial access channels in order to increase their profits. Since that replacement is not occurring, the Commission's calculation of the costs and benefits associated with leased commercial access must overlook some costs. To some extent, these overlooked costs are the very costs that the Commission later claims are too speculative to measure. These costs are the hidden costs of leased access, in particular the impact of leased access on subscribership and subscriber revenues.

"An Analysis of the Federal Communications Commission's Maximum Reasonable Leased Commercial Access Rate," annexed as Attachment A to Comments of National Cable Television Association, Inc. ("NCTA"), at 12 (note omitted).

services to which the Commission's formula assigned a negative value, viewer demand clearly established the true value of the services:

- Fifty-six percent responded that deletion of the services for leased access would "very substantially lower the value" of their cable television service, with an additional 24 percent viewing the value as "substantially lower."

- Eighty-one percent of subscribers would be "very angry" or "pretty angry" over the deletions.

- Twenty-five percent of those subscribers would act on their anger by "definitely" canceling their cable service, and an additional 27 percent "probably" would do so.

- Thirty-six percent would "definitely switch" to an available alternative video programming provider, with an additional 43 percent "probably" switching.

"Leased Access Programming Issues Survey," annexed as Attachment G to TCI Comments, at 5-6; see "The Research Network Survey," annexed as Attachment 2 to Comments of Continental Cablevision, Inc. ("Continental") for a similar survey of subscriber demand in Continental's Broward County, Florida system.

Liberty Sports recognizes that cable operators exercise their editorial discretion to develop an appropriate mix of popular well-known cable networks with mass appeal and a variety of niche channels which strongly appeal to smaller demographic subscriber segments. See Continental Comments at 13-16; TCI Comments at 12-14; "Impact of FCC's Leased Access Proposal" at 3-5. Within that mix, niche programming services are playing an increasing role in expanding subscribership and, therefore, are becoming more valuable. See, e.g., Affidavit of Robert A. Stengel, annexed as Attachment 1 to Continental Comments, at ¶19.

Consequently, Liberty Sports has attempted to structure a variety of sports programming services, including specifically targeted regional networks, a Spanish language sports programming service, and a "showcase" service featuring women's, classic, and other sports. The value of the sports programming services offered by Liberty Sports and other programmers in adding and retaining cable subscribers is well established. For example, a survey of 257 cable subscribers identified "sports" programming as the second most "influential" type of programming "in their decision to subscribe to cable or their reason for continuing their subscription," with 55 percent of the surveyed subscribers identifying sports programming. "Venues Driving Cable Subscriptions/Retention (Unaided and Aided Responses)," annexed as Exhibit 1 to Comments of US West.

Although admittedly difficult to quantify, subscriber demand and preferences clearly translate into revenue gains or losses for cable operators. For example, a loss of only 1 percent of a typical Continental system's subscribers corresponds to a monthly loss of roughly $.21 per subscriber. Continental Comments at 11. Similarly, a 10 percent loss of business in a Time Warner Cable ("Time Warner") system would result in a loss of "approximately 50 cents per leased access channel per subscriber." A. Daniel Kelley, "An Economic Analysis of Commercial Leased Access Pricing," annexed to Time Warner Comments, at 20. Not surprisingly, Mr. Kelley concludes that "[c]osts of this nature must be factored into any commercial leased access pricing analysis."[2] Id.

[2] Programmers suggest other measures for valuing channel capacity in order to reflect the impact of programming services on viewer demand. For example, ESPN suggests that the Commission's analysis should reflect the millions of dollars invested in "programming, technology, image advertising, customer relations, and other marketing-related endeavors to 'earn' and maintain carriage...." Comments of ESPN, Inc. at 4. Discovery Communications, Inc. ("Discovery") points to the "resources expended on attracting and keeping cable viewers" as an indicator of value. Discovery Comments at 7.

II. Mandatory Preferential Packaging Further Increases The Subsidy To Leased Access Programmers.

In addition to seeking carriage on widely-distributed tiers, Liberty Sports negotiates for channel placement among clusters of popular programming services. One industry expert described the value created by such packages of programming services as the "spillover" of audiences among program services "Impact of FCC's Leased Access Proposal" at 6. With increased viewership resulting from such carriage and channel positioning, advertisers can reach larger audiences, which in turn generates larger advertising spot revenues for programming services and cable operators. Id. at 3-4.

Providing leased access channels with a "genuine outlet" to subscribers does not mandate preferential packaging in the most widely-distributed tiers. A tier of leased access channels, which is technically available to all subscribers and for which the anti-buy through requirements of 47 C.F.R. §76.921 would be applicable, provides adequate subscriber access without eliminating a cable operator's editorial discretion and the ability of other programming services to compete for carriage on preferred channels Mandatory channel placement for leased access channels would simply allow such services to "free-ride" on the quality of other programming services. "Impact of FCC's Leased Access Proposal" at 6-7. Neighboring channels which withstood deletion would nonetheless be harmed because of a decrease in the "positive spillover" attributable to such leased access free-riders. Id. at 17-20. Finally, and perhaps most importantly, mandatory carriage of leased access channels on basic and widely-distributed tiers necessarily would limit the carriage opportunities of other programming services -- no tier can have an unlimited number of channels. As Liberty Sports noted in its initial comments at 6, mandatory carriage would not "promote competition in the delivery of diverse sources of video programming" as required under 47 U.S.C. §532(a).

III. Subsidized Leased Access Would Cause Widespread Deletion Of Existing Programming Requiring Transitional Relief.

The record clearly establishes the current shortage of channel capacity and the extensive use by cable operators of unused leased access allotments to carry other programming services. Artificially-increased demand through subsidized leased access would require the deletion of those services in systems across the country.[3] Because of the shortage of channel capacity, existing programming services would be unable to expand their subscribership or even recoup subscribers lost to deletions. Likewise, new programming services would be precluded from launching. In order to mitigate the harm to cable operators, programmers and subscribers resulting from any such deletions and disruptions in cable service, the Commission should adopt appropriate transitional rules.

Phased Implementation. As Liberty Sports noted in its comments at 7, sports programming services must make significant multi-year programming commitments based on reasonable business plans and projections. See Comments of The Travel Channel at 18; Comments of Encore Media Corporation at 7. Neither cable operators nor programmers reasonably could have anticipated the potential for a drastic increase in leased access demand because of subsidized leased access pricing. Consequently, the Commission should adopt a

[3] Such subsidized leased access and consequent deletions raise serious issues under the First and Fifth Amendments to the Constitution. See Comments of Outdoor Life Network, Speedvision Network, The Golf Channel, and BET on Jazz ("Outdoor Life, et al.") at 28-30; Comments of Cable Programming Coalition of A&E Television Networks, The Courtroom Television Network, NBC Cable and Ovation ("Coalition") at 40-53.

multi-year transition period to implement any expanded leased access rules. Alternatively, as suggested by other programmers, the Commission should grandfather the carriage of existing services, adopt separate pricing methodologies for vacant and occupied channels, or implement a transition to new rules based on increases in channel capacity. See ESPN Comments at 7; Comments of Lifetime Television at 7; Coalition Comments at 58; Outdoor Life, et al. Comments at 37-38.

Minimization of Unnecessary Deletions. The Commission should not require the deletion of full-time programming services for part-time leased access carriage. Such deletions would decrease programming diversity and unnecessarily harm cable operators, programmers and subscribers. Coalition Comments at 59-60; Outdoor Life, et al. Comments at 30-33; TCI Comments at 33-34.

Flexible Deletion Designations. If the Commission abandons its present valuation proposal and continues to value leased access across categories of channels, its proposal that cable operators designate annually the channels to be deleted would be unnecessary. See Coalition Comments at 57-58 (a programming "hit list" would "create undue alarm with viewers, third party programmers, investors and advertisers, causing a decrease in revenue and support"). At the very least, the Commission should permit cable operators to revise any required deletion designations to reflect changed circumstances and to enable programmers to negotiate for continued carriage

Such transitional rules will not address the fundamental failure of the Commission's valuation methodology to predict a realistic value for leased access channels. They merely mitigate the harshest impacts of the artificial leased access demand and consequent programming deletions created by subsidized leased access. Any meaningful solution to these problems requires that the Commission abandon its current proposal.

Conclusion

The record in this proceeding is clear -- the Commission's proposed formula for valuing leased access ignores the impact of programming on consumer demand for cable service, the most important element of that value. Consequently, the Commission's methodology consistently yields negligible leased access values which contradict human experience and business practices. The net effect of the Commission's proposal would be massive disruption in the programming services available to viewers, resulting in decreased programming diversity and consumer welfare. Liberty Sports respectfully submits that the Commission should withdraw and reevaluate its leased access valuation proposal.

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Respectfully submitted,

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